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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 344

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 11 F. (2d) 3. It appears in the Record herein at pages 539-553.

Certiorari was granted by this court May 24, 1926. (271 U. S. 656; 46 Sup. Ct. Rep. 630; 70 L. Ed. 1135.)

The charge of the District Court to the jury appears in the Record herein at pages 373-406.

JURISDICTION.

The judgment under review was entered by the Circuit Court of Appeals on February 15, 1926 (R. 553), affirming a judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, in conformity with the verdict of a jury, in favor of the United States of America and against petitioners. The jurisdiction of this court to issue a writ of certiorari and review the judgment is found in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936.

STATEMENT OF THE CASE.

During the year 1921 the petitioner T. H. Deal was postmaster at Fairbanks, Alaska. The United States Fidelity & Guaranty Company, the other petitioner herein, was surety on the postmaster's bond. On the afternoon of September 15, 1921, the First National Bank of Fairbanks, Alaska, registered a package at the Fairbanks postoffice, addressed to Frank Doner, special disbursing agent of the Alaska Engineering Commission at Healy, Alaska. As there was no postoffice at Healy, the package was registered to Nenana. According to the testimony of the officers of the bank who made up the package, it contained $9900.00 in currency and $37.65 in silver. The bank messenger who presented the parcel for registration did not declare its contents. The register clerk who registered it did not know what it contained. She thought it was

money, but was not sure. (R. 54.) The dispatching clerk placed the parcel, with another registered package, in a paper jacket provided for such purpose, wrapped some twine around it, and placed it in the safe, where it remained until the morning of September 16th. The safe was left on the day combination. On the morning of the 16th the dispatching clerk took the package from the safe and deposited it in the Nenana pouch. It then appeared to her to be in the same condition as when she placed it in the safe the evening before. (R. 73.) The pouch was locked by the postmaster. The lock on the pouch was ordinary iron, to which every postoffice and every railway mail clerk has a key. (R. 74.) Wetzler, Postoffice Inspector, testified that the lock could be picked with a piece of steel wire without much difficulty. (R. 222.)

The adopted method of carrying the mail from the Fairbanks postoffice to the railroad warehouse was by an express wagon driven by one Lillico. The mail, including the pouch referred to, was so carried on the morning of September 16th and was delivered by Lillico to Keller, in charge of the warehouse. Keller was freight clerk of the Alaska Engineering Commission and was not an employe in the postal service. (R. 91.) He handed the sacks to Nordby, brakeman, who placed the same in the freight car provided for the purpose. This car was then switched to the other side of the warehouse, where the train was being made up, and it stood there about an hour. (R. 94.) So far as the evidence disclosed, the mail remained entirely unguarded

during this hour. The sliding doors to the car carried no locks and were held in place only by a hook on the outside.

The mail was carried on September 16th, as on other days, from Fairbanks to Nenana in this box car. It was the method and means provided by the Government. No sworn employe of the postal service was in charge. The mail received only such oversight as the freight received, namely, the conductor and brakemen were supposed to see that the doors were kept hooked while the train was in motion and that no person other than one of the train crew should enter the car. While the train was in motion the head brakeman was supposed to ride on the locomotive and the rear brakeman in the passenger coach at the end of the train. There was no evidence as to where the brakemen rode on this particular day, but the evidence showed that a number of stops were made en route and that freight was unloaded from the car in which the mail was carried. The mail pouches were in plain view, on top of the freight at one end of the car.

The trip from Fairbanks to Nenana ordinarily consumed three hours, but on this particular day it took much longer. During the trip a fire broke out in a gondola car loaded with wood. This car was next to the locomotive. The freight car containing the mail was immediately behind the car of wood. Then came another freight car, with one or two passenger coaches at the rear. The fire caused much excitement. Every member of the train crew, together with the passengers, were engaged in extin-

guishing it, and more than half an hour was required to do so. A great deal of smoke surrounded the train.

Late in the afternoon of that day the mail reached the Nenana postoffice, and the registered package in question was delivered by the Nenana postmaster to the agent of the addressee. The package was opened in the presence of the Nenana postmaster and was found to contain an old magazine and $37.65 in silver, but no currency.

Where the package was rifled, whether in the postoffice at Fairbanks, or in the course of transmission to Nenana, the Government was never able to discover; nor was it ever able to discover who was guilty of the theft. Not being able to otherwise account for the loss, the Government commenced this suit, over a year and a half after the loss occurred, against Deal and his surety for damages in the sum of $9,900.00, with interest and costs, upon the theory that the theft occurred through some negligence of the postmaster, although the Government had absolutely no evidence that the theft occurred in the Fairbanks office or that it proximately resulted from any negligence on the part of the postmaster. The second amended complaint alleges that the package was opened and rifled due to the postmaster's negligence and disregard of the postal laws and regulations. (R. 6.) It is further alleged that prior to and at the time of said loss the postmaster neglected to perform his duty with respect to the registered package as imposed upon him by law and the regulations of the

Postoffice Department, particularly Sections 361, 524, 940 and 1015 of the Regulations of 1913; that he failed to use ordinary care in the handling of the package, and failed to properly protect and safeguard it. (R. 6.)

Motions were made by both defendants to require plaintiff to make said complaint more definite and certain as to what particular acts of negligence of the postmaster were the cause of the depredation upon the package, what laws or regulations he violated, the violation of which caused the loss, and in what respect he failed to exercise ordinary care with reference to the package, and in what way he neglected to protect and safeguard it. (R. 16-21.) These motions were denied. (R. 21.)

Demurrers to the complaint were interposed on the ground that no cause of action was stated and that the facts alleged did not show that the postmaster was liable in any way for the alleged damage suffered by the plaintiff. (R. 22-23.) These demurrers were overruled. (R. 24.)

Defendants answered, denying all material allegations of the complaint. (R. 25-30.) Trial was had to a jury, and on February 20, 1925, a verdict was returned in favor of the plaintiff and against both defendants for the sum of $9,900.00, with interest thereon at the rate of 8% per annum from September 16, 1921. (R. 418.) Motions were filed for a new trial and overruled, and under date of March 3, 1925, judgment in conformity with the verdict was given and entered. (R. 427.)

Thereafter plaintiff filed a cost bill in the sum of $3,098.45. (R. 428-431.) Exceptions and objections thereto were interposed by the defendants. (R. 432-436.) The clerk taxed the costs as rendered. (R. 437.) Defendants appealed to the trial court and petitioned the court to retax the costs, and the matter was presented upon an agreed statement of facts. (R. 437-445.) On May 4, 1925, the court retaxed the costs in the sum of $3,036.25. (R. 445-446.) Exceptions were duly taken to this order and to the refusal of the court to retax in accordance with the defendants' petition. (R. 446-449.)

Thereafter and in due time a writ of error was allowed to have the aforesaid judgment and order reviewed by the Circuit Court of Appeals for the Ninth Circuit. (R. 515.)

ASSIGNMENTS OF ERROR.

Petitioners rely upon the following assignments of error:

(1) The court erred in overruling defendants' motion to require plaintiff to make its second amended complaint more definite and certain, by alleging definitely what alleged acts of negligence were relied upon by plaintiff as occasioning the loss alleged to have been suffered by plaintiff.

(2) The court erred in overruling the separate demurrers of the defendants to plaintiff's second amended complaint.

(3) The court erred in overruling the defendants' motion for a nonsuit at the conclusion of plaintiff's case.

(4) The court erred in overruling defendants' motion for a nonsuit after the close of all the evidence and before the matter was submitted to the jury.

(25) The court erred in giving to the jury its instruction No. 17, which was as follows:

> "You are instructed that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package in controversy contained money belonging to the plaintiff herein, or that all the circumstances as disclosed by all the evidence in the case were sufficient to charge him with knowledge that said registered package in controversy contained money, the property of the plaintiff herein; and if you find and believe from a preponderance of the evidence in this case that, when the said registered package was received into the United States postoffice at Fairbanks, Alaska, it was so received from the First National Bank of Fairbanks, Alaska, addressed to Frank T. Doner, Special Disbursing Agent of the Alaska Engineering Commission, at Healy, Alaska, via Nenana, Alaska, and that such package was an ordinary canvas or cloth sack, sealed at the top and heavy at one end, and that the person receiving it at the postoffice for registry had reason to believe, and did believe, that it contained money, taking all the circumstances as disclosed by the evidence into consideration, and that the defendant Deal was present and assisting in despatching the said package when contained in a paper jacket ordinarily used for enclosing registered packages, then I instruct you as a matter of law that the

belief of the employee who received the said package into the postoffice as to the contents thereof is imputed by the law to the defendant Deal himself, and you, as jurors, would be warranted in assuming and believing that, under the circumstances of the case, he also believed the said registered package to contain money, and that said money was the property of plaintiff herein."

(26) The court erred in giving to the jury its instruction No. 19, which was as follows:

"You are instructed that one of the conditions and obligations imposed upon the defendant Deal by his acceptance of the office of postmaster of the United States postoffice at Fairbanks under the terms and conditions of the bond, which it is admitted he executed as principal and the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, executed as surety, is to the effect that the defendant Deal shall faithfully discharge all duties and trusts imposed upon him as postmaster, either by law or by the regulations of the Postoffice Department; and if you find and believe from a fair preponderance of the evidence in this case that the duties and trusts imposed upon the defendant Deal as postmaster, either by law or by the regulations of the Postoffice Department, required that, as such postmaster, before he should ship any registered package out of his office and on its way to its destination that he should enclose the same in a sealed jacket, and that, with reference to the registered package in controversy in this action, he failed to do so, and that the said package, while in his care and custody, was rifled, and any money, the property of the United States, removed therefrom, then and in that event the defendant Deal and the surety upon his official bond would be responsible for

the loss occasioned by such removal, and in that event you should find a verdict for the plaintiff for an amount equal to the amount of money which you find to have been removed from said registered package."

(27) The court erred in giving to the jury its instruction No. 21, which was as follows:

"You are further instructed that, if you find and believe, from a preponderance of the evidence, that the registered package in controversy in this action was not placed in a sealed jacket and the contents thereof witnessed, as required by the postal laws and regulations, by the defendant Deal personally, but that the same was done by the stamp clerk, who had been employed by the said Deal as postmaster, only a month before, and that she had not theretofore received any instructions from the said defendant Deal as postmaster, or from anybody in his behalf and under his supervision, with reference to the rules laid down by the United States postal laws and regulations concerning the handling, caring for, guarding and despatching of registered packages, and that the defendant Deal failed in his duty in supervising the method employed by the said stamp clerk in so handling, caring for, guarding and despatching said registered package in controversy, then I instruct you that the violation and disregard of the United States postal laws and regulations by the said stamp clerk is by the law imputed to the defendant Deal personally; and if you further find from a preponderance of the evidence that a loss occurred to the plaintiff in the sum of $9,900.00, and that said loss occurred in the United States postoffice at Fairbanks, Alaska, and not elsewhere, under the above-mentioned conditions, you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(28) The court erred in giving to the jury its instruction No. 22, which was as follows:

"You are instructed that the official oath of the defendant Deal as postmaster, among other things, contains the following provision: 'And that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control: So help me God.' In this connection you are instructed that, if you find and believe from a preponderance of all the evidence in the case, that the defendant Deal knew that the registered package in controversy contained money, and that said money was the property of the United States, and that the said registered package was looted and rifled of $9,900.00 in currency while it was in his care and custody and control in the United States postoffice at Fairbanks, and that, when the said registered package was despatched from the said postoffice, it had the bottom thereof torn open and fastened temporarily with an eight-penny or a ten-penny finishing nail, and the sum of $9,900.00 which it formerly contained had been abstracted and removed therefrom, and it then contained only $37.65 of the money which it had contained at the time it was delivered into the Postoffice by the First National Bank, if you find from a preponderance of the evidence it was so delivered, and that at the time the said registered package left the said postoffice in the registry pouch it contained only $37.65 in silver, and a copy of the Popular Mechanics magazine, and a finishing nail holding the cut portions of the sack together, and that thereby the plaintiff herein sustained a loss of $9,900.00, and that the plaintiff has demanded from the defendants, and each of them, the payment of said sum of $9,900.00, and that they, and each of them, have refused to pay the same, then I instruct you that you

should return a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(30) The court erred in giving to the jury its instruction No. 24, which was as follows:

"You are instructed that if you find and believe from a preponderance of the evidence in the case that a loss of $9,900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe in which was contained the registered package in controversy during the night of September 15, 1921, and morning of September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff; otherwise your verdict should be for defendants."

(31) The court erred in giving to the jury its instruction No. 26, which was as follows:

"You are instructed that if you find and believe from a preponderance of the evidence that a loss of $9,900.00 occurred to the plaintiff in the United States postoffice at Fairbanks, Alaska; and if you further find that at any time during the period that he was postmaster in said postoffice and prior to the 16th day of September, 1921, the defendant Deal failed to change the combination on the safe in which the registered package in controversy was stored during the night of September 15, 1921, and the morning of September 16, 1921, until it was despatched from the said postoffice, then you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(32) The court erred in giving to the jury its instruction No. 27, which was as follows:

"You are instructed that if you find and believe from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein, otherwise your verdict should be for the defendants."

(51) The court erred in permitting the witness G. Wetzler, over defendants' objections, to testify as follows:

"Q. Mr. Wetzler, state whether or not you found a large stack of magazines in the postoffice at Fairbanks, Alaska.
A. Yes, sir."

(57) The court erred in permitting the witness J. E. Fitzgerald, over defendants' objections, to testify as follows:

"Q. Did you, at that time, make a search in the postoffice for finishing nails similar to the one that Mr. Wetzler turned over to you?
A. I made a search, yes, sir.
Q. What did you find?
A. I found several finishing nails, the same kind as the one stuck in the sack."

(74) The court erred in refusing to re-tax the costs allowed to A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt, and W. B. Raeburn, and in allowing

them full amount of mileage and per diem set forth in the cost bill, and in refusing to re-tax said costs and allow each of said witnesses mileage for but two hundred miles and per diem for the time actually consumed in traveling one hundred miles to Fairbanks and one hundred miles from Fairbanks, and for the days they were actually in attendance on said court in the trial of said cause, and in allowing said witnesses the full amount of mileage set forth in said cost bill and per diem for the full number of days set forth therein.

(75) The court erred in allowing any witness fees or mileage to the witness James Hagan, a deputy United States marshal.

(76) The court erred in sustaining the clerk's taxation of the costs respecting the witnesses A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt, W. B. Raeburn and James Hagan.

ARGUMENT.

I.

THE CHARGE TO THE JURY, PRESENTING THREE INCONSISTENT THEORIES UPON WHICH THE POSTMASTER COULD BE HELD LIABLE, WAS FATAL ERROR UNLESS, BECAUSE OF SOME PROVISION OF THE POSTAL LAWS OR REGULATIONS, THE POSTMASTER WAS CHARGED WITH RESPONSIBILITY FOR THE LOSS (1) IF, WHILE THE PACKAGE WAS IN HIS POSSESSION, HE FAILED TO OBSERVE ANY REGULATION RELEVANT TO ITS CARE, IRRESPECTIVE OF WHETHER HIS NEGLIGENCE PROXIMATELY RESULTED IN THE LOSS, OR (2) IF HE KNEW THAT THE PACKAGE CONTAINED MONEY BELONGING TO THE UNITED STATES. PETITIONERS CONTEND (1) THAT A POSTMASTER'S RESPONSIBILITY FOR THE LOSS OF REGISTERED MAIL IS DEFINED BY SECTION 940 OF THE REGULATIONS, WHICH CONDITIONS HIS LIABILITY UPON NEGLIGENCE HAVING CAUSAL CONNECTON WTH THE LOSS, AND THAT SECTION 291 OF THE REGULATIONS HAS NO APPLICATION; AND (2) THAT A POSTMASTER IS NOT CHARGED WITH THE RESPONSIBILITY OF AN INSURER OF REGISTERED MAIL CONTAINING MONEY OF THE UNITED STATES, IRRESPECTIVE OF WHETHER OR NOT HE HAS KNOWLEDGE OF WHAT THE PACKAGE CONTAINS.

By the instructions which are assigned as error under assignments numbered 26, 27, 30, 31 and 32, the trial court directed the jury to return a verdict in favor of the plaintiff if they found that the loss occurred in the Fairbanks office and also found that

the postmaster failed to observe certain of the postal regulations, such as not changing the combination on the safe, not fully locking the safe, permitting unauthorized persons to have access to the room where the package was stored, etc. The element of proximate cause was omitted from these instructions. Therefore, since it was conceded by the postmaster that he did not observe some of these regulations, the jury were obliged by these instructions to return a verdict for the plaintiff if they found that the loss occurred in the Fairbanks office.

By the 22nd instruction (assignment of error numbered 28), the trial court directed the jury to return a verdict for the plaintiff if they found that the loss occurred in the Fairbanks office and also found that the postmaster knew that the package contained money belonging to the United States. Under this instruction the jury were obliged to return a verdict for the plaintiff, even though the postmaster performed every duty imposed upon him, if they found that he knew what the package contained and also found that the theft occurred while the package was in his care.

Notwithstanding the foregoing instructions, unconditionally and unequivocally charging the jury to find for the plaintiff under definite conditions regardless of negligence and proximate cause, the trial court gave other instructions to the effect that the jury should find for the defendants unless they were satisfied by a preponderance of evidence that the loss was due to the postmaster's negligence. In-

structions 13 and 25 were to such effect. Instruction number 13 was as follows (R. 392):

> "You are instructed that the burden is on the plaintiff, who in this case is the United States of America, to prove not only the loss of money enclosed in the registered package described in plaintiff's complaint, but also that said loss occurred while the package was in the possession of and under the control of the Postmaster at Fairbanks, Alaska, and that the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations of the Postoffice Department pleaded in plaintiff's complaint, and unless the plaintiff proves every necessary fact by a preponderance of the evidence, then your verdict must be for the defendants."

Instruction number 25 was as follows (R. 402):

> "You are instructed that on the 15th and 16th day of September, 1921, the regulations of the United States Postoffice Department provided that postmasters would be held personally responsible by the Postoffice Department for depredation upon or loss of any registered letter or parcel, if such depredation or loss was due to negligence or disregard of the regulations of the Postoffice Department by the postmaster; and if you are satisfied a preponderance of the evidence that there was a depredations upon the registered package referred to in plaintiff's complaint on either of said dates, and before said package had left the possession of the postmaster at Fairbanks, then you are instructed that unless you also find by a preponderance of the evidence that said depredation upon said package and loss of the contents thereof was attributable to or was due to negligence and disregard by the postmaster of the law or regulations of the Postoffice Department, as alleged in plaintiff's complaint, then your verdict must be for the defendants."

Needless to say, the challenged instructions were not cured by the 13th and 25th instructions. The jury were directed, under a certain state of facts, to return a verdict for the plaintiff, and they had the right to assume, when so instructed, that the court in those instances determined as a matter of law, not only that a disregard of any of the postal regulations cast the postmaster with liability for the loss, regardless of proximate cause, but that he was an insurer of the safety of the package and responsible for its loss if he knew it contained money belonging to the United States.

It is elementary that where an instruction directs a verdict for the plaintiff, if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant, and to warrant the direction or conclusion that the plaintiff is entitled to a verdict; further, that where instructions are flatly contradictory they are necessarily prejudicial, since it cannot be ascertained upon what theory the verdict was returned.

In the case of *Armour v. Russell*, 144 Fed. 614, Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, says:

> "The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed."

In the case of *Durant v. Percy*, 93 Fed. 166, 169, Judge Sanborn says:

> "A general verdict on an erroneous instruction cannot stand, where there were two theories on which the jury might have found it, and under one of which the instruction was harmless, while under the other it was error, because the presumption from error is prejudice, and the court cannot say upon which theory the verdict stands."

In the case of *Standard, etc. Ins. Co. v. Sale*, 121 Fed. 664, Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, says:

> "These instructions stated the law correctly. But the mere giving them without recalling or explaining the instructions given on the court's own motion would not be likely to remove the impression already made. In order to render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced.
>
> The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed. Bank of Metropolis v. New England Bank, 6 How. 212, 12 L. Ed. 409; Gilmer v. Higley, 110 U. S. 47, 28 L. Ed. 62."

We are thus confronted with two questions:

First: Is a postmaster unconditionally liable for the loss of registered mail while in his possession if he fails to observe one or more of the postal regulations relevant to such mail, even though his negligence in no way contributes to the loss?

Second: Is he unconditionally liable as an insurer for the loss of registered mail while in his possession, if known by him to contain money belonging to the United States?

Unless one or both of these questions can be answered in the affirmative, the judgment herein cannot stand.

The Circuit Court of Appeals answered the first question in the affirmative and the second in the negative, but held that the error of the trial court in charging that the postmaster was an insurer, and responsible as such, was without prejudice, in view of the concession that he failed to observe some of the regulations relevant to registered mail.

Petitioners contend that both questions should be answered in the negative; that there is no more latitude under the postal regulations for charging a postmaster with responsibility for the loss of registered mail not proximately caused by his negligence than there is for charging him with responsibility as an insurer if the package contains Government property.

(a) Postmaster not liable unless loss is the result of negligence.

The universal rule is that negligence in the performance of a duty creates no liability unless the negligent act is the proximate cause of injury. The act must have been such that without it the injury would not have happened. On any other theory the imposition of liability requires contractual or

statutory authority for its enforcement. In the case of a postmaster, if he can be held responsible for the loss of registered matter for which his negligence was not the proximate cause, it can only be by virtue of some express statute or specific regulation of the Post Office Department, or by virtue of contractual liability which in its essence imposes upon him the obligations of an insurer. If no such statute or regulation exists, and if no duty as an insurer of registered matter is assumed, we submit that no valid liability can be charged against a postmaster without producing evidence fairly tending to prove that the loss complained of was the result of his negligence or disregard of some particular regulation.

The Circuit Court of Appeals found in Section 291 of the Postal Laws and Regulations authority for the conclusion that, for the loss of registered mail containing money belonging to the United States, a postmaster is responsible if he fails to observe any of the regulations relevant to such mail, irrespective of whether his negligence has causal connection with the loss, notwithstanding Section 940 of the regulations, which specifically limits his responsibility to loss arising from negligence.

Section 291 will be found on page 141 of the "Postal Laws and Regulations", 1913 Edition, and is as follows:

> "When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in

which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise."

Section 940 will be found on page 468 of said compilation, and is as follows:

"Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

In its decision the Circuit Court of Appeals says (R. 547):

"There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when postoffices are robbed. The general responsibility of a postmaster is that of a bailee charged with a high decree of care. U. S. v. Rogde, 214 F. 283, 295. If his postoffice is robbed and he has failed to exercise due care of the stolen property he is responsible absolutely and it is not necessary for the

Government to show that his want of care was the proximate cause of the loss."

(b) Section 940, not Section 291, defines responsibility when registered mail is stolen.

We submit that the Circuit Court of Appeals is in error when it says that Section 940 "defines the general responsibility of postmasters" and Section 291 "their responsibility when post offices are robbed". We submit that the court has given neither section its true significance. We submit that Section 291 defines the responsibility of postmasters for *Government property* stolen, and that Section 940 defines their responsibility for *registered mail* stolen.

(c) Structure of Regulations proves our contention.

Section 291 is a part of Subdivision V, of Chapter 3, of Title Three of the Postal Laws and Regulations. The subject of Title Three is "Post Offices". Chapter 3 thereof is entitled "General Provisions Relating to Post Offices". Subdivision V of Chapter 3, in which Section 291 is found, is entitled "Miscellaneous Provisions".

Section 940 is a part of Subdivision V, of Chapter 1, of Title Six of the Postal Laws and Regulations. The subject of Title Six is "Registry System". Chapter 1 thereof is entitled "Registration of Domestic Mail Matter". Subdivision V of Chapter 1, in which Section 940 is found, is entitled

"Treatment of Registered Matter at Offices of Delivery".

It is at once apparent that Title Three, which includes Section 291, covers *general* provisions, and that Title Six, which includes Section 940, covers *particular* provisions,—provisions relating exclusively to the registry system. The very structure of the Regulations challenges the conclusion of the Circuit Court of Appeals that Section 940 defines the general responsibility of postmasters and Section 291 their responsibility when post offices are robbed. We submit that the structure of the Regulations compels a conclusion directly to the contrary of that reached by the court.

(d) Section 291 applies to Government property only.

Considering Section 291, standing alone and unaffected by the structure of the Regulations, we submit that the responsibility of a postmaster thereby defined is confined to *Government property* stolen.

By its terms it requires him, when his office has been robbed, to make an immediate report to the inspector in charge, giving, if possible,

> "all circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of government property."

Immediately following these directions comes the provision that "the postmaster shall be held *re-*

sponsible for the loss", etc. The loss referred to must necessarily be the property previously mentioned,—*all Government property.* Registered mail is not included. It is later in the section that registered mail is mentioned, and then in the following language:

> "Full particulars regarding registered mail lost or rifled should be reported."

The only duty or responsibility imposed upon the postmaster by this section of the regulations with reference to registered mail lost or stolen is to report full particulars thereof. If it had been intended to make the postmaster responsible for registered mail as for stamped paper and other Government property, we submit that registered mail would have been mentioned and included with the Government property referred to and have preceded the definition of the scope of the postmaster's responsibility. We submit that it is perfectly clear that the section was drafted with a design that the high degree of responsibility thereby created should apply only to Government property.

We submit that the form in which Section 291 is cast discloses a clear intent to omit all reference to the postmaster's responsibility for loss or theft of registered mail, and the reason why the section is so cast lies in the fact that his responsibility in that particular is elsewhere defined, namely, in Section 940.

(c) Section 940 applies to Registered Mail stolen.

Turning now to Section 940, and considering it standing alone and unaffected by the structure of the Regulations, we submit that it defines in unmistakable terms the responsibility of postmasters for registered mail stolen. We submit that there is nothing in the frame of the section which justifies the conclusion of the Circuit Court of Appeals that it defines the general responsibility of postmasters. It very definitely declares that they will be held responsible if wrong delivery, depredation or loss "of any registered letter or parcel" be due to their "negligence or disregard of the regulations". This is not a declaration of general responsibility. It is a declaration of specific responsibility, a responsibility conditioned upon the absence of due care, a responsibility that does not attach unless it is made to appear that if an omitted duty had been performed no wrong delivery, depredation or loss would have occurred, and a responsibility confined to a "registered letter or parcel".

Furthermore, the word "depredation" comprehends burglary, theft or robbery. One definition of the word "depredate", given by all authorities, is "to rob or pillage". In the case before us we have a definite instance of depredation. The package was broken open and a magazine substituted for the currency. If consequence is to be attributed to words, the case presented is not one of robbery at all, but purely one of depredation or theft. Robbery implies violence or threats of injury. No vio-

lence, no threat of injury, was resorted to in the case before us. That much, at any rate, we know.

It is clear, therefore, that to reach the conclusion that the responsibility of the postmaster was defined by Section 291 instead of by Section 940, the Circuit Court of Appeals was compelled to give to the word "depredation" found in Section 940 a literal or technical significance, a meaning not sufficiently comprehensive to cover a theft perpetrated as this one was, and to give to the word "robbery" found in Section 291 a liberal or general significance, a meaning sufficiently comprehensive to cover ordinary theft. We submit that the court was not justified in resorting to such an extremity. If it was compelled to give literal effect to Section 940, it was not at liberty to give general effect to Section 291. Justice cannot be the issue of such inconsistency.

While the regulations of the Post Office Department have the force of law, it is not to be supposed that they were drafted with the same refinement of definition as are criminal statutes. We maintain that the regulations should be construed or interpreted liberally so as to give effect to their intent or purpose. That it was the intent that Section 940, and not Section 291, should define the responsibility of postmasters for the theft of registered mail admits of no doubt. That this is so is obvious, not only from the language of the respective sections, but from the structure of the regulations as a whole, and from the fact that Section 940 is a part of Title Six relating to the registry system; and such being the obvious intent, we submit that it was the duty

of the court, under fundamental principles of statutory construction, to so construe other sections of the regulations, if it could be reasonably done, as not to nullify that intent. Section 940 ceases to be of any consequence, in instances of depredations, if the decision of the Circuit Court of Appeals is correct. Section 291 should be construed in such a way as to uphold and not nullify Section 940, and it is clearly susceptible of such a construction. Indeed, as we have pointed out, it is a manifestly unwarranted construction of Section 291 to make it applicable in any respect whatever to the responsibility of postmasters for the theft of registered mail.

(f) Saving clause of Section 291 inapplicable to registered mail.

On the proposition under discussion it is to be observed that if Section 291 defines the responsibility of postmasters for the theft of registered mail, a more onerous responsibility is cast upon them therefor than for the theft of Government property. Section 291 contains a saving clause, applicable to Government property stolen but impossible of application to registered mail stolen. Said clause reads:

> "The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise."

Section 150 of the Regulations is Chapter 231 of the Act of May 9, 1888 (25 Stat. 135), as amended

by Chapter 424 of the Act of June 11, 1896 (29 Stat. 458). It is as follows:

> "The Postmaster General * * * is hereby authorized to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed, and also to credit postmasters with the amount of any remittance of money-order funds or postal funds made by them in compliance with the instructions of the Postmaster General, which shall have been lost or stolen while in transit by mail from the office of the remitting postmaster to the office designated as his depository, or after arrival at such depository office and before the postmaster at such depository office has become responsible therefor: *Provided*, That no claim exceeding the sum of ten thousand dollars shall be paid or credited until after the facts shall have been ascertained by the Postmaster General and reported to Congress, together with his recommendation thereon, and an appropriation made therefor: *And provided further*, * * * that no claim for losses * * * shall be allowed unless presented within six months from the time the loss occurred.
>
> 2. It is hereby made the duty of the Postmaster General to report his action herein to Congress annually, with his reasons therefor in each particular case."

Provision is thus made to relieve a postmaster from the consequences of the responsibility imposed

by Section 291 for loss by theft where the loss is not the result of his negligence, *but the relief is confined to Government property stolen.* No provision is made for relief when registered mail is stolen. For the theft of registered mail, whether due to his negligence or not, Section 291, if it applies, casts the postmaster with a responsibility limited only by the value of the thing stolen, and from which he cannot be relieved, if he has failed to observe any of the regulations, and this despite the fact that the liability of the Government is limited to $100.00.

A postmaster knows what Government property is in his care and he knows its value. As to such property he knows the extent of his liability. But he has no means of knowing the value of registered mail entrusted to his care, unless the person registering it voluntarily declares its value. He cannot compel a declaration. He is obliged to accept the parcel and, should it be stolen while in his care, obliged to make good its full value, if he has failed to fully observe the regulations, even though his neglect in no way contributed to the theft.

It thus appears, if the decision of the Circuit Court of Appeals is correct, that a more onerous responsibility is cast upon postmasters for the loss by theft of registered mail than for the loss by theft of Government property, and a more onerous responsibility for registered mail than the Government itself assumes. It is inconceivable that the postal regulations were drafted with such a design,

and we submit that they are not reasonably susceptible of such a construction.

In the case of *United States v. Rogde*, 214 F. 283, 294, Judge Elliott says, after quoting Section 150 of the Regulations last hereinabove quoted:

> "By an act approved January 21, 1914, the indemnity above provided for was extended to include postal savings funds, postal savings cards, postal savings stamps, postal savings certificates, key deposit funds, funds deposited to cover postage on mailing, and funds deposited to cover orders for stamped envelopes. Congress by the statutes has expressly provided for the relief of postmasters from absolute liability that is imposed upon them by statute for the property that belongs to the government of the United States. The very fact that these statutes have never been extended to cover ordinary mail matter or registered mail is persuasive at least that such extraordinary liability with respect to mail matter was never contemplated and that the interpretation given the statutes and regulations by Congress was that there existed no such liability without negligence."

For the foregoing reasons we respectfully submit that the responsibility defined by Section 291 applies to Government property alone, and that Section 940 defines the responsibility of postmasters as to registered mail.

(g) Theory of responsibility as an insurer untenable.

By the 22nd instruction (assignment of error No. 28) the trial court charged that the postmaster was liable for the loss of the package if he knew that

it contained money belonging to the United States, even though he observed all of the regulations relevant to its care.

The Circuit Court of Appeals disapproved this instruction, but held that it was error without prejudice in view of the particular facts of the case.

If we are right in our contention that Section 940 and not Section 291 defines the responsibility of a postmaster for the loss of registered mail, it follows that the giving of the 22nd instruction was prejudicial error. We now wish to inquire whether there was justification for said instruction.

The trial court based said instruction upon Section 360 of the postal regulations, the decision of this court in the case of *Smythe v. United States*, 188 U. S. 156, and the oath taken by the postmaster upon his assumption of office. This oath, in part, was as follows:

> "I will honestly and truly account for and pay over any money belonging to the United States which may come into my possession or control." (R. 15.)

Section 360 of the Postal Regulations is Section 3846 of the revised statutes, and is as follows:

> "Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out."

The case of *Smythe v. United States* involved the liability of the superintendent of the Mint at New

Orleans for the loss, without his negligence, of Government money in his possession. The money in question was destroyed by fire while contained in a vault in the Mint, the superintendent being in no way negligent in its care. The contention of the Government, which this court upheld, was that the superintendent, under statutory duties which he had sworn to perform, was under the obligation, practically, of an insurer in respect of all public funds coming into his hands, and could not be relieved unless the loss occurred by the act of God or the public enemy. His duties as prescribed by statute required him, among other things, *to safely keep*, until legally withdrawn, all moneys or bullion which should be for the use or the expenses of the Mint. His oath of office bound him to faithfully perform the duties thereof, and his bond was conditioned that he should do so. The court says:

> "The government can stand upon the terms of its special contract with the superintendent, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over, when required. * * * They [the treasury notes received by Smythe] were not safely kept, nor were they destroyed through overruling necessity or by the public enemy. Hence, there was a breach of his bond."

In other words, when Smythe took the oath and accepted the office of superintendent of the Mint, the statutory liability to safely keep all money which was for the use or the expenses of the Mint became an obligation of his contract of employment,

and was enforceable against him unaffected by any element of negligence.

Now it is quite obvious that the foregoing decision did not justify the 22nd instruction in the case before us unless it can be said that under Section 360 of the Postal Regulations a postmaster is required to "keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds" a registered package coming into his possession and known by him to contain money belonging to the United States. By merely taking an oath to faithfully perform his duties and account and pay over any money belonging to the United States that may come into his possession, a postmaster certainly does not assume the responsibility of an insurer of registered mail belonging to the Government unless such responsibility is cast upon him by said Section 360.

We submit that there is nothing in the language of said section consistent with an intent to define a postmaster's responsibility as to government funds being transmitted by means of the registry system. Registered matter does not come into a postmaster's possession in the sense that money collected by him comes into his possession. He is not the custodian of registered matter as he is the custodian of money he collects. He does not hold registered matter until it is ordered to be transferred by the Postmaster General, even though the package might contain government money. He could not loan, or use, or deposit, or exchange for other funds money of the Government contained in

a registered parcel, without unlawfully breaking open the parcel and extracting the contents. It is ridiculous to contend that Section 360 was promulgated with any thought to define the duties of a postmaster as to government money unlawfully extracted by him from a registered package. In fact it is impossible to sensibly apply the provisions of Section 360 to the duties of a postmaster relative to registered matter in any particular whatever.

Subjoined to Section 360 is a note reading:

> "The regulations relative to the care of public funds apply to money-order, key-deposit, and postal savings funds as well as postal funds."

If it had been the intent to apply the regulations relative to the care of public funds to registered matter containing such funds, we would expect to find it stated here. A matter of such importance would not be left to inference.

Furthermore, if it was the purpose of the Post Office Department to hold postmasters accountable for registered matter containing such money, to the same extent as for postal funds, we would expect to find a definite regulation to that effect embodied in Title VI of the Regulations, relating to the Registry System. But no such provision exists. On the other hand there does exist Section 940, a part of Title VI, providing, as heretofore pointed out, that postmasters are responsible for the loss of registered matter only when occasioned by their negligence or disregard of the regulations. That section,

obviously designed to define and limit the responsibility of postmasters for registered matter, does not distinguish between packages registered for individuals and packages registered for the Government, which we submit it necessarily would do if it had not been intended to apply to all cases.

For the foregoing reasons we respectfully submit that a postmaster is not responsible for the loss of registered mail unless the loss is the proximate result of his negligence; that he is not responsible as an insurer for the loss of registered mail known by him to contain money belonging to the United States; that, therefore, the Circuit Court of Appeals was right in holding that the trial court erred in giving the 22nd instruction, but was wrong in holding that the error was without prejudice.

II.

IF A POSTMASTER IS RESPONSIBLE AS AN INSURER OF REGISTERED MAIL CONTAINING MONEY BELONGING TO THE UNITED STATES, HIS RESPONSIBILITY IS NECESSARILY CONDITIONED UPON HIS HAVING KNOWLEDGE OF THE OWNERSHIP AND CONTENTS OF THE PACKAGE; AND RECOVERY CANNOT BE HAD AGAINST HIM FOR THE LOSS OF SUCH MATTER WITHOUT ALLEGING IN THE COMPLAINT THAT HE POSSESSED SUCH KNOWLEDGE WHILE THE PACKAGE WAS IN HIS CARE, AND WITHOUT PRODUCING EVIDENCE TO PROVE SUCH ALLEGATION. IN THIS CASE THERE WAS NEITHER ALLEGATION NOR PROOF OF SUCH FACT.

If under the postal laws or regulations a postmaster is responsible as an insurer of registered mail containing money belonging to the United States, we suppose it will not be claimed that such responsibility arises if he is ignorant of the character and ownership of the package. We assume that it will be conceded that such a high degree of responsibility would arise only where he had information that he was being entrusted with the care of such property. It would be manifestly unjust, and contrary to reason, to charge him with such responsibility for property which he did not know belonged to the Government.

The trial court realized that it was impossible to hold the postmaster responsible as an insurer unless the jury found that he knew that the package contained money belonging to the Government, and it

will be observed that the 22nd instruction definitely charges the jury that such knowledge was a prerequisite to the assumption of such responsibility.

By instruction No. 14 (R. 392-394) the trial court informed the jury that the Alaska Engineering Commission was a governmental agency, maintained by appropriations from the United States Treasury, for the purpose of constructing and operating the Alaska Railroad, and that if they found that the money contained in the registered package was in exchange for checks belonging to the Commission, such money was the property of the United States. There was evidence, admitted over defendants' objection, that the money contained in the package was in exchange for checks belonging to the Commission. There was no evidence to the contrary. In this situation instruction number 14 was the equivalent of a direct charge that the money in the package was Government property. The jury were not at liberty to consider it otherwise.

By the 17th instruction (assignment of error No. 25) the jury were charged that they were warranted in assuming and finding that the postmaster believed the package contained Government money if the clerk who received and registered it believed it contained money, not Government money, but just money; that the belief of the clerk was imputable to the postmaster.

The three instructions (Nos. 14, 17 and 22) were not in sequence. They were intermingled with other instructions not relevant to the proposition to which

they applied. It is necessary, however, to consider them together, as presenting to the jury the law on a particular theory of the case; otherwise, the 17th instruction, bearing upon the registry clerk's belief as to the contents of the package, and imputing her belief to the postmaster, was an entirely useless instruction. We are privileged to assume that the jury attributed consequence to this instruction as well as to all others, and they necessarily construed it as meaning that belief and knowledge were synonymous states of mind; that if they found that the registry clerk *believed* the package contained money they were warranted in finding that the postmaster *knew* it contained money, or government money, since the belief of the clerk was imputed to the postmaster. The three instructions were therefore the equivalent of a charge that the jury should return a verdict for the plaintiff if they found (1) that the package contained government money, (2) that the clerk who registered it believed it contained money (not necessarily government money), and (3) that the theft occurred in the Fairbanks office.

But there was no evidence whatever, direct or circumstantial, that either the postmaster or the registry clerk knew what the package contained. That being so, the jury must have concluded, if they gave their verdict upon the theory of the postmaster's responsibility as an insurer, that the registry clerk believed that the package contained money and that her belief was enough to charge the postmaster with knowledge that it did, in view of the

17th instruction that the clerk's belief was imputable to him. As we have said above, the jury had the right to assume, and presumably they did, that every instruction should be given effect. The 17th instruction could have meant nothing less to them than that belief and knowledge were synonymous states of mind.

Construing the instructions as the jury unquestionably construed them, they were clearly erroneous, for it is well settled that belief is not the equivalent of knowledge. In the case of *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466, it is said:

> "Between mere belief and knowledge there is a wide difference. The Court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute."

The Supreme Court of California said in *Humphreys v. McCall*, 9 Cal. 59, 62:

> "There is a clear distinction between positive knowledge and mere belief, and they cannot both exist together."

It is perfectly obvious that belief admits of all degrees, from the slightest suspicion to the fullest assurance; but knowledge admits of no degrees. In the instant case, the postmaster could not be held responsible as an insurer in the absence of knowledge that government funds were being intrusted to his care. It was not enough to call forth such responsibility that fortuitous circumstances created in his mind, or in the mind of the registry clerk, a suspicion or even some assurance that the package

contained money or government money. He was entitled to notice, to positive information, of that fact, so that he could take the necessary precautions to safeguard his responsibility. He was not obliged to be on guard. He was not obliged, if he suspected or even believed that the package contained money, to make inquiry and ascertain with certainty what it contained. He was not in the position of a purchaser of property with notice of facts sufficient to put him upon inquiry relative to the existence of an unrecorded conveyance. It was no part of his duty to investigate. The rule that notice of facts and circumstances which would put a man of ordinary prudence on inquiry is, in the eyes of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose, applies only where inquiry becomes a duty. (29 Cyc. 1114.) It is inapplicable here for the obvious reason that the duty rested upon the forwarder of the package to notify the postmaster of its contents and not leave the postmaster to the hazard of acquiring the information otherwise. In failing to so notify the postmaster the forwarder, who in this case was the agent of the Government, was negligent. There was no negligence on the part of the postmaster.

For the foregoing reasons we submit that instructions 14, 17 and 22, considered in their entirety, were erroneous.

But we contend that instruction No. 17 was erroneous for still another reason. We contend that there is no support in the law for the proposition that the mere belief of the registry clerk was im-

putable to the postmaster. We may concede that, as a general proposition, a postmaster is chargeable with the knowledge acquired by his employee while acting in the course of his employment and within the scope of his authority. We may concede that as a general proposition a postmaster is chargeable with the knowledge obtainable from inquiry prompted by notice to his employee, acquired while acting in the course of his employment and within the scope of his authority, of facts and circumstances sufficient to put an ordinarily prudent person upon inquiry. Such is the general rule in the relation of principal and agent. But the rule has no application here for two reasons. In the first place the registry clerk did not know that the package contained money. She testified that she was not sure. She merely thought it contained money. Therefore she had no knowledge that could be imputed to the postmaster. In the second place, there being no duty of the postmaster to make inquiry as to the contents of the package, he was not chargeable with what his registry clerk thought or believed about it. Even if the clerk told him what she thought or believed, no obligation was cast upon him thereby, as he was under no duty to investigate.

We submit, therefore, that the 17th instruction was erroneous from either point of view. If it was given upon the theory that belief and knowledge were synonymous, it was erroneous on that ground. If it was given upon the theory that belief was something less than knowledge, it was still erroneous, for the reason that anything less than actual

knowledge was not sufficient to cast any duty or responsibility upon the postmaster.

The instruction is subject to the further criticism that it advises the jury that they were warranted in assuming and finding that the postmaster believed the package contained money, and that said money was government property, if they found that the registry clerk believed it contained merely money. The effect of the instruction was to impute to the postmaster something more than the clerk's belief,—to impute to him belief as to ownership of the thing in addition to belief as to its character.

Instructions 17 and 22 were further erroneous in presenting any issue to the jury based upon the postmaster's knowledge of the contents of the package. Instruction 17 says "that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package contained money belonging to the plaintiff herein". There is no such allegation in the complaint. There is no allegation from which such fact can be implied. Instruction 22 directs the jury to give a verdict for the plaintiff if they find that the postmaster knew the package contained government money and also found that the loss occurred in the Fairbanks office. Since no issue was presented on the proposition of the postmaster's knowledge, it was error to instruct the jury along that line. The authorities to this effect are numerous and need not be cited. They will be found in the American Digest under the subject of "Trials", Section 251(1).

Finally, on the general proposition of the postmaster being chargeable with the belief of the registry clerk, we contend that there was no evidence to sustain a finding that the clerk believed the package contained money. Her testimony on the subject was brief, consisting of an answer to only one question asked her by counsel for plaintiff, whose witness she was:

> "Q. Did you have any knowledge as to what the parcel contained?
>
> A. Well, I thought it was money. I wasn't sure." (R. 54.)

What the clerk thought, in view of her admission that she was not sure, cannot be said to be of the dignity of a belief. When she said she was not sure, she in effect said she was not in possession of sufficient information to form a belief; and when she stated that she thought it contained money, she in effect said she supposed it did, without having any belief whatever on the subject. The answer was pure surmise and speculation.

Nor was there any other fact or circumstance in evidence justifying a finding that she believed the package contained money. She of course knew that the package came from the bank, but the messenger who brought it did not inform her of its contents, nor was she otherwise informed. It might have contained blank checks, or cancelled checks, or certificates of stock, or documents, or various things other than currency. The single circumstance that it came from a bank was not enough to justify a belief that it contained money. The circumstance

might have created a suspicion, but it could do no more. Nor was the circumstance that the package was franked sufficient to justify a belief that it contained money. Such circumstance would justify a belief that the sender or receiver bore some relation to the Government, but further than that it could have no significance.

It is submitted, therefore, that irrespective of any infirmity in the instructions on the theory of the postmaster's responsibility as an insurer, since there was no allegation and no evidence that the postmaster had actual knowledge of the contents of the package, a verdict in favor of plaintiff based upon that theory cannot be sustained.

III.

THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION IN THAT NO PARTICULAR ACT OF NEGLIGENCE WAS CHARGED AS BEING THE CAUSE OF THE LOSS, AND WAS THEREFORE VULNERABLE TO DEFENDANTS' DEMURRERS.

If the postmaster in this case was not responsible as an insurer for the loss of the registered package, and if he was not responsible in any event unless the loss was the proximate result of some negligence on his part, it follows, if the complaint failed to state a cause of action for damages arising from negligence, that defendants' demurrers to the complaint and their motions to make it more definite and certain should have been sustained. These de-

murrers and motions were overruled. (Assignments of error 1 and 2.) They raised the point that the complaint was deficient in that no particular act of negligence of the postmaster was alleged as being the cause of the loss and that it was not alleged which of the regulations he disregarded that resulted in the loss. While the ruling of the trial court on the motions to make more definite and certain were not reviewable on writ of error, the demurrers presented the same propositions, and reference is made to the motions to show what was considered in the determination of the demurrers.

The fatal defect in the complaint, considered as one for negligence, is that no negligent act or omission is charged. Negligence as a conclusion is charged, but no specific act having causal connection with the theft of the package is alleged to have been negligently performed, nor is it alleged that any specific duty or series of duties, having such connection, was or were negligently omitted.

The allegation is that the package was opened and rifled "due to the negligence of said T. H. Deal, and due to the disregard of the postal laws and regulations by said T. H. Deal". (R. 6.)

If the complaint contained no more than the single allegation that the package was opened and rifled "due to the negligence of said T. H. Deal", we do not suppose it would be seriously contended that a cause of action was stated. Such an allegation does not state what was done, in the doing of which there was negligence. It is as vital and nec-

essary to allege *what was done* as it is to allege that there was negligence in what was done; but when the negligent act has been properly set forth in the complaint, the fact that it was negligently done may be so pleaded, without stating in detail in what the negligence consisted.

In 29 Cyc. at page 570 it is said:

> "While there is not entire harmony in the adjudicated cases as to the proper method of pleading negligence, the rule sustained by the weight of authority is that, negligence being the ultimate fact to be pleaded and not a mere conclusion of law, a declaration or complaint *charging defendant with an act injurious to plaintiff*, with a general allegation of negligence in the performance of the act, is sufficient." (Italics ours.)

In California the rule is expressed as follows in the case of *Smith v. Buttner*, 90 Cal. 95:

> "It is well settled that negligence may be charged in general terms; that is, *what was done being stated*, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. *But it must appear from the facts averred that the negligence caused or contributed to the injury.*" (Italics added.)

And in the later case of *Maxwell v. Durst*, 178 Cal. 752, the same court says:

> "*What was done*, with the charge that the same caused or contributed to the injury, *must be alleged*, but to show that there was negligence in what was done, which is likewise essential, it is sufficient to allege that it was negligently done, without stating more particularly what the matters constituting such negligence were." (Italics added.)

As pointed out by the same court, in the case of *Stephenson v. Southern Pacific Co.*, 102 Cal. 143:

> "Negligence is not the *act* itself, but the fact which defines the character of the act, and makes it a legal wrong. * * * It is sufficient to allege the negligence in general terms, *specifying, however, the particular act alleged to have been negligently done.*" (Italics added.)

The foregoing authorities are sufficient, without citations from other jurisdictions, to show the distinction between a negligent act and the particular in which the act was negligent. The act itself must be set forth in sufficient detail to present an issue, to inform the defendant what it is that plaintiff claims the defendant did or neglected to do, the doing of which resulted in the injury; but the fact that the act was negligently done may be stated in general terms.

The allegation we find in paragraph IX of the complaint, that the package was opened and rifled "due to the negligence of said T. H. Deal", is obviously insufficient. No act of commission or omission is stated. It is equally obvious that the same deficiency exists in the allegation in said paragraph, that the package was opened and rifled "due to the disregard of the postal laws and regulations by said T. H. Deal". Such an allegation is merely another way of saying that the postmaster failed to perform his duty, without specifying any duty which would necessarily have causal connection with the theft of registered parcels. Manifestly, there are various postal laws and regulations which could be disregarded with impunity, without in the least

affecting the safety of mail or registered matter. If an allegation of that kind were sufficient, it would never be necessary in negligence cases to set forth the particular act or omission which it was claimed occasioned injury. If such an allegation were sufficient, it would be enough, in an action against a carrier, to allege merely that it neglected its duty towards the injured person; or, in an action against a physician for malpractice, merely that he neglected his duty towards the patient.

In *Thompson on Negligence*, Section 7458, the rule is stated as follows:

> "It will not be sufficient to allege that a duty existed upon the part of the defendant, and that he violated such duty; but the facts must be stated, showing the legal liability. Unless the duty results, in all cases, from the stated facts, the declaration so framed will be bad."

Nor can it be said that the allegations contained in paragraph X of the complaint eke out its insufficiency. It is there alleged that prior to and at the time of the loss the postmaster

> "failed, refused and neglected to perform his duty as such with reference to said registered package of mail matter in the manner required by law, and violated the obligations of said bond and writing obligatory referred to in paragraphs IV, V, and VI of the complaint herein."

This is the same allegation as is contained in paragraph IX, just considered, stated in slightly different language. The allegation is a pure conclusion. No facts are alleged from which it can be

determined that the theft of the package was occasioned by any act or omission of the postmaster.

The further allegation in paragraph X, that the postmaster

> "failed to observe, perform and discharge the duties and trusts imposed upon him by law and the regulations of the Postoffice Department with reference to said registered package,"

is another conclusion of the same character. So, also, is the allegation that the postmaster

> "failed and neglected to use ordinary care in handling the said registered package."

Since negligence is the lack of ordinary care, the allegation that the postmaster failed to use ordinary care in handling the package amounts merely to an allegation that he was negligent in handling the package, which is a pure conclusion.

The same criticism applies to the allegation that the postmaster

> "failed and neglected to properly protect and safeguard the said registered package as registered mail matter."

It is a pure conclusion, that he neglected to properly protect and safeguard the package. What he did that he should not have done, or what he failed to do that he should have done, in the protection of the package, should have been definitely stated, and it was then for the jury to determine whether, under all of the facts and circumstances in evidence, he neglected to properly protect the package.

The further allegations that the postmaster

> "failed and neglected to handle said registered package as such in the manner prescribed by law and the regulations of the Postoffice Department, and handled the same in a careless and negligent manner, and in utter disregard of the law and the said regulations aforesaid, particularly of sections 361, 524, 940 and 1015 of the regulations of said Postoffice Department promulgated in 1913,"

do not supply the necessary facts for the statement of a case. They are each and all pure conclusions, failing to specify any act of omission or commission which caused or contributed to the theft.

A complaint based upon negligent conduct must not only show the particular duty or duties owed by the defendant to the plaintiff, a breach thereof, and the injury sustained, but also a causal connection between the act and the injury. An allegation that the defendant's negligence was the proximate cause of the injury is insufficient when not sustained by the facts alleged. Causal connection between the act and the injury *must appear from the facts alleged*. If no facts are alleged, it is impossible to say that the injury proximately resulted from the act complained of; and even if the facts are averred, if there is a hiatus in the link of alleged causal connection, the complaint is deficient. These are elementary propositions of pleading in negligence cases.

In the instant case, no facts are stated from which it can be determined that the theft of the package proximately resulted from any act of the postmaster

or any breach of duty of the postmaster. Plaintiff was required to do more than simply allege that due to the postmaster's neglect of duty the theft occurred, for the obvious reason that many duties, even those relating to registered matter, could be wholly disregarded without jeopardizing the safety of a registered package. The Regulations (Section 891) require that all registered matter dispatched in iron-lock mail bags shall be accompanied with registered package receipt card or a manifold bill describing each registered package. Failure to comply with this requirement could not possibly have causal connection with the theft of the contents of the bag. And as to duties not relating to the registry system, even more particularity was required in stating the facts of the alleged negligent act or omission in order to show causal connection of the theft therewith. The postmaster had manifold duties,—duties relating to the money order system, to the delivery service, to ordinary mail matter, as well as to registered matter. Plaintiff's complaint comprehended the entire field. Sections 361 and 524, neither of which relates to the registry system, are specially referred to in the complaint, but no facts are alleged from which it appears that the theft could possibly result from any breach of duty imposed by either of these sections. Section 361 reads:

> "Postmasters must exercise all possible care for the protection of the public funds and property in their custody.
>
> If the post office is not such a reasonably safe place as to warrant the postmaster in leaving

his own funds in it at night, or when the building is unoccupied, all moneys and postage stamps should be removed to a place of greater security. During business hours money and postage stamps should be kept in places inaccessible to the public and concealed from view.

When funds or postage stamps are left at night in offices unprovided with iron safes, they must be kept in strong drawers or other fixed receptacles, which must be securely fastened with good locks. The doors and windows of the office should be made as secure as possible. The same precautions shall be taken when the post office is closed temporarily during the day.

Where stamps and funds are kept in iron safes with 'combination locks', such safes shall be carefully and completely locked at night or when the office is left without occupants. No credit will be allowed for losses from safes fastened only with what is termed a 'day lock' or 'day combination'.

A postmaster upon taking charge of his office shall immediately change the combination on every safe therein; and where at any time a safe is procured, either new or second hand, he shall immediately change the combination. Failure to make such change shall be considered as prima facie evidence of contributory negligence on the part of the postmaster in any case where claim is made for credit for money or other property stolen from such safes which have been opened without resort to violence."

It is clear from a casual reading of said section that it does not relate to registered matter at all. It refers to the care of public funds and property exclusively. The duty of a postmaster in the matter of changing the combination on the safe, and the matter of keeping the safe completely locked, be-

comes of consequence only when he asks to be credited for public funds stolen therefrom. The duty to change the combination and to keep the safe completely locked is nowhere imposed upon him for the care of registered packages; therefore, any neglect on his part to do these things was not *per se* an omission of any duty having causal connection with the theft of the package. It is obvious, therefore, that if the theft of the package was proximately caused by the failure of the postmaster to change the lock on the safe, or to completely lock the safe, his liability or responsibility for the loss did not arise from a breach of any duty imposed by Section 361, but from neglect to keep the package in a place of reasonable security, and what he did or neglected to do in this respect should have been definitely alleged. Upon such an issue the jury would have been required to determine whether he exercised such care for the safety of the package as the circumstances demanded. They might very well have believed that reasonable prudence did not require the safe to be completely locked; or they might have believed that failure to completely lock the safe was not the proximate cause of the theft. They certainly could not have believed that failure to change the combination had anything to do with the theft unless there was evidence that the theft was perpetrated by a person familiar with the combination, and if this was the theory upon which plaintiff intended to maintain the case, the complaint should have stated the facts.

It will be noted, in passing, that the jury were instructed that failure on the part of the postmaster to completely lock the safe, and to change the combination, was actionable negligence *per se*, casting upon him responsibility for the theft if it took place in his office. The charge was erroneous, not only because it omitted the element of proximate cause, but because the duties prescribed by Section 361 do not relate to registered matter at all.

Let us now consider Section 524, specifically referred to in the complaint. It reads:

> "Postmasters shall not permit to have access to any mail matter in the post office any persons except duly sworn assistants, clerks, letter carriers, post office inspectors, and those mail contractors and carriers who, under the terms of the contract, are required to perform duties necessitating their personal presence in the post office. (Amendment of June 11, 1919.)
>
> Mails should not be made up or handled within reach of unauthorized persons, and such persons should be excluded from the room appropriated to the use of the post office while the mails are being opened or made up.
>
> An ex-postmaster shall not be permitted to have access to or handle mail unless he takes the oath of office anew.
>
> Postmasters shall always require post office inspectors to exhibit their commissions before being admitted to the post office, in order to avoid imposture, unless such officers are personally known to them."

It is not alleged in what particular these duties were ignored, or that they were ignored at all. The allegation is that the postmaster handled the pack-

age "in a negligent manner and in utter disregard of the law and the said regulations aforesaid, particularly of Sections 361, 524", etc. But even if this could be construed as the equivalent of an allegation that the postmaster permitted an unauthorized person to have access to his office while the package remained there, the complaint was still insufficient because there was lacking the essential allegation that such person committed the theft or that he was an accessory to the theft. As above pointed out, it must appear from the facts averred, and not as a conclusion, that the negligence complained of was the proximate cause of the theft. It goes without saying that to support a judgment against the postmaster for the loss of a package based upon his act in permitting an unauthorized person to have access to his office, evidence was required to show that such person was in some manner connected with the theft. Negligence in permitting unauthorized persons to have access to the office called forth no liability of the postmaster for the loss if such persons were innocent of any connection with the crime. As it was necessary to produce proof, equally necessary was it to allege that the unauthorized person was the criminal. In the absence of such an allegation, no fact was averred from which it was made to appear that a violation of any provision of Section 524 had any causal connection with the theft.

Section 940 of the regulations is also specially referred to in the complaint as one "in utter disregard" of which the postmaster handled the pack-

age "in a careless and negligent manner". The section reads:

> "Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

The inefficacy of a reference to this section to show any negligent act or omission having causal connection with the theft of the package is at once apparent. Indeed, reference to the section emphasizes the necessity of stating in what the alleged negligent act consisted and which it is claimed proximately caused the loss. The burden was upon the plaintiff not only to prove but to allege a case within the terms of this section.

Section 1015 of the Regulations of 1913 is another section specially referred to in the complaint. Said section reads:

> "Postal employees shall use registered paper jacket envelopes in the dispatch of five or more separate registered articles addressed to or intended for distribution by the same post office, railway post office, or transfer clerk, when at least one record and handling of the articles in transit will thereby be saved.
>
> Postmasters at offices in Alaska are authorized to use registered paper jacket envelopes in the dispatch of one or more letters and small sealed parcels, when the method of handling the registered matter in transit or the conditions of its transmission justify the use of jackets in order to give greater protection to the mail.

> When applicable the rules governing rotary-lock pouches and sacks shall be observed in the opening and closing of registered jacket envelopes; in other respects the treatment of the jacket envelopes shall be as prescribed for registered letters and parcels, except as modified herein."

Nowhere in the complaint is it made to appear that a disregard of the provisions of this section could possibly have any causal connection with the theft of the package, especially a theft occurring in the office. The section obviously has to do with the security of mail matter while in the course of transmission, after having been dispatched from the forwarding office. The section does not require registered packages to be kept in these jackets while remaining in the office. The theory of the complaint was that the package was rifled while it remained in the possession of the postmaster, not while it was in the course of transmission. That being so, we submit that it is impossible to conceive how any disregard of the provisions of Section 1015 could in the slightest degree contribute to the theft, and if plaintiff had attempted to allege facts showing such connection, instead of alleging it as a conclusion, the impossibility of so doing would have been instantly apparent.

Enough has been said to show how inadequate was the complaint to state any negligent act or omission of the postmaster having causal connection with the theft. It is perfectly clear from the frame of the complaint that the Government had

no knowledge that the theft of the package was due to any negligent act of the postmaster. This is confirmed by the failure of the Government to produce any evidence reasonably tending to prove such fact. It is perfectly clear that the sole foundation of the action was surmise and suspicion, and it is equally clear that the jury determined the cause solely upon surmise and suspicion. For this reason it cannot be said that the denial of defendants' motions and demurrers was harmless error. If plaintiff had been required to state in the complaint the particular act or acts of negligence complained of, with sufficient particularity to make it appear that the theft of the package was the proximate result thereof, the jury would readily have seen that no evidence was before them to sustain the charge; but when all that was alleged was the conclusion that the postmaster neglected his duties, and that due thereto the package was rifled, and when it was conceded that the postmaster failed in some respects to perform his duties, the jury were given the opportunity, indeed, they were constrained, to base their verdict upon surmise and suspicion. It was the natural thing for them to believe that it was their duty to determine where the loss occurred and who was responsible for it. Not having before them any evidence definitely establishing that the theft occurred outside of the Fairbanks office, they would naturally believe they were obliged to find that it occurred in that office, notwithstanding that the burden was upon the plaintiff to prove

that it occurred there. Once having concluded that the theft took place in the office, and no evidence being before them as to how it occurred, they would naturally believe they were obliged to find that it was due to some negligence on the part of the postmaster, notwithstanding that the burden was upon the plaintiff to prove that the theft was the result of the postmaster's negligence. It is the purpose of pleadings to present a definite issue, to which the evidence must be directed, and upon which the trial court is supposed to properly instruct the jury as to the law. In this case we know that, in view of the instructions, the jury had no liberty of judgment, but even otherwise, in view of the allegations of the complaint, the defendants were compelled to risk a result arrived at, not from a fact alleged and supported by evidence, but from a conclusion supported only by suspicion.

We submit that in a case of the character of the one at bar, it cannot be said that no injustice resulted to the defendants from the defects of the complaint here considered, even if the jury had been correctly instructed as to the law.

IV.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT, AS IT WAS NOT SHOWN THAT THE POSTMASTER'S NEGLIGENCE HAD CAUSAL CONNECTION WITH THE LOSS, AND AS THE FACTS AND CIRCUMSTANCES THAT WERE CONSISTENT WITH THE THEORY THAT THE LOSS OCCURRED IN THE FAIRBANKS OFFICE WERE EQUALLY CONSISTENT WITH THE THEORY THAT IT OCCURRED WHILE THE PACKAGE WAS BEING TRANSPORTED TO NENANA.

Petitioners contend that no evidence was adduced to support a finding that the theft of the package was proximately caused by any negligence of the postmaster, or a finding that the theft occurred in the Fairbanks office. It was necessary that these two facts be established before any valid judgment could be given against either the postmaster or his surety, and the burden of proof was upon the plaintiff.

Consider, first, the proposition that the theft was proximately caused by the postmaster's negligence. The burden was upon the plaintiff to prove this fact. As is said in the case of *Puget Sound, etc. Co. v. Hunt*, 223 Fed. 952, 956:

> "The proximate cause of an injury is never presumed. On this question there is no conflict of authority. See 29 Cyc., 600, and the numerous cases there cited."

Furthermore, as stated by the California District Court of Appeal, in the case of *Hopkins v. Heller*, 210 Pac. 975:

> "The evidence must be such that more than a suspicion or surmise arises therefrom. The burden of proof resting upon the plaintiff requires that the evidence of negligence proximately causing the injury be evidence which leads—not merely wavers—toward the fact sought to be proved."

What evidence is there that the theft of this package was the result of any negligence of the postmaster or of any disregard of his duties? We say, and we emphasize it, that there was none at all. It is to be remembered that no act or omission of the postmaster can be said to be the proximate cause of the theft unless it is made to appear that the theft would not have occurred if the negligent act had not been done or if a given duty had not been omitted. Of course, it is not claimed that the postmaster was guilty of any affirmative act of negligence. The only claim is that he failed to do what he should have done.

Now it is not shown nor attempted to be shown that the package was rifled as a consequence of any duty omitted by the postmaster. It is not shown that the thief was a person who was permitted to have access to the mail contrary to postal regulations. It is not shown that the depredation was due to the postmaster's failure to seal the jacket in which the package was placed, or by his failure to personally witness its contents, or to instruct the stamp clerk in her duties relative thereto. It would be impossible to ascribe the theft to any such neglect of duty, since the jacket was not to be

sealed until the package was ready for transmission. It is not shown that the failure of the postmaster to fully lock the safe, or to change the combination of the safe, contributed to the theft, and we contend that it is not a permissible inference that the theft was perpetrated by reason of the postmaster's neglect to do any of these things. There is no license to say that if the safe had been fully locked and the combination changed, the theft would not have occurred.

Take whatever duty you please, which it is shown the postmaster omitted, and we challenge respondent to point out any evidence which would justify the inference that the theft resulted therefrom. The cold fact stands out that plaintiff had no evidence whatever to prove that the postmaster's neglect of duty had anything to do with the theft. Nobody knew how the theft occurred or who committed it. The jury were permitted to assume that the postmaster's neglect of duty must have occasioned the loss since the loss could not be otherwise accounted for. Such a verdict was based upon surmise and suspicion, and nothing more.

We submit that in this situation the jury should have been directed to return a verdict for the defendants.

Consider, secondly, the proposition that the theft took place in the Fairbanks office. Here, again, the burden of proof rested upon the plaintiff, and no judgment against the postmaster or his surety

was warranted if this burden was not met. We submit that it was not met.

The evidence produced on plaintiff's behalf showed the history of the package from the time it was made up in the First National Bank at Fairbanks on the afternoon of September 15th until it was opened at Nenana on the evening of September 16th. The evidence showed how the package was transported. The various persons who had it in charge testified as to their care of it. From this evidence the inference was sought to be drawn that no depredation was or could have been made upon the package after it left the Fairbanks office, consequently, according to the theory of plaintiff, the theft must have occurred there.

An examination of the evidence bearing upon the question of where the theft took place will show that it was altogether circumstantial, and was as consistent with the theory that it occurred outside of the post office as with the theory that it occurred inside the post office; and it is the contention of petitioners that since the evidence tends equally to sustain the two inconsistent propositions, neither of them was established by legitimate proof, and that the verdict in favor of the plaintiff, upon whom the burden of proof rested, was essentially wrong.

There was no direct evidence that the package was rifled while it reposed in the post office. There was no evidence that any person not a sworn employee of the postmaster, other than E. A. Hering,

was in the office at any time while the package was there. There was no evidence that the post office was broken into. There was no evidence that any doors or windows remained unlocked or open when the sworn employees were not present. There was no evidence that the safe in which the package was placed had been tampered with. There was no evidence of any kind that either the office or the safe had been burglarized.

There was evidence, admitted over defendants' objection, that a stock of old magazines was in the office, but there was no evidence that the magazine found in the package when it was opened was among this stack, or that it was ever in the Fairbanks office. There was evidence, admitted over defendants' objection, that a box of nails of miscellaneous sizes, some of the kind with which the broken canvas sack was fastened, was on a shelf in the office, but there was no evidence that the nail found in the sack was ever in the Fairbanks office.

It was conceded that Hering was in the office for about fifteen minutes around eight o'clock on the evening of September 15th. The undisputed evidence is that he was not then a sworn employee, but that up to a month prior thereto he had been, and that on this occasion he entered the office with the postmaster's consent and knowledge and by means of the postmaster's key for the purpose of dispatching certain mail. The uncontradicted testimony is that Hering was in the habit of assisting in the work after he ceased to be a regular em-

ployee, and that after ceasing to be such employee he assisted in familiarizing his successor (Miss Smith) in the performance of her duties. These services were performed by him gratuitously and at the postmaster's request.

Quite obviously it was possible for Hering to commit the theft. It was equally possible for one of the regular employees, either Miss Houck or Miss Smith, to commit it. It was equally possible for the assistant postmaster, W. W. Clark, to commit it. It was possible for the postmaster himself to commit it. All of these persons had access to the package. The plaintiff made no contention, however, that either of these persons was the thief, nor was any evidence attempted to be adduced to connect either of them with the crime.

While there was no evidence tending to show that the theft took place in the office, there was some evidence to show that it did not take place there. The testimony of Miss Smith was that the package, when it was placed in the mail pouch on the morning of September 16th and sent to the train, was in the same condition as when it was received from the bank. It was she who placed the package in a registered jacket. In doing so she tore the corner of the jacket slightly, as the package made a very tight fit. After putting the package in the jacket she bound it around with twine and placed it in the safe. It was she who took the package from the safe on the morning of the 16th and placed it in the mail pouch. When

she took it from the safe she found it in the position where she had left it the previous afternoon. It was wrapped just the same. The torn corner of the jacket was just the same. There was nothing to indicate to her that the package had been touched while it reposed in the safe. A very significant fact was that when the package arrived at Nenana the tear in the jacket was much larger than when it left the Fairbanks office.

The foregoing are circumstances strongly indicating that no depredation upon the package was made prior to the time that it left the Fairbanks office. The most that can be said in support of the contention that the theft occurred in the Fairbanks office is that by virtue of the accessibility of the package to Hering and the office employees and officials, it was possible for one of them to commit the theft. The evidence further shows, however, that the package was equally accessible to other persons after it left the Fairbanks post office and while it was in the course of transmission to Nenana.

As pointed out in our opening statement of facts, the pouch into which the package was placed for transmission was an ordinary iron-lock pouch. It was proper to use such a pouch for registered mail. The same key unlocks all pouches of that kind, and every postmaster has such a key. This lock can be picked without much difficulty. The mail was carried in an unguarded freight car. This car, with the mail therein, stood unguarded for nearly an hour before the train left Fairbanks on the

morning of September 16th. Freight from this car was unloaded at different points en route. While all hands were engaged in extinguishing a fire which broke out during the trip, and while the train was surrounded with smoke, the mail in the freight car remained unprotected. There was ample opportunity for a thief to rifle the mail while it was being transported. During all of this time the mail, and this registered package in particular, was as accessible to the various members of the train crew, and to any other person who entered the car, as it was to any person in the Fairbanks office. The doors of the freight car carried no locks, but were merely hooked on the outside.

To preclude a supportable verdict in favor of the plaintiff it was enough that the evidence showed accessibility of the mail to persons outside of the postoffice equally with persons within the office, and this the evidence did show indisputably. It was readily accessible to the conductor and to the two brakemen. The presumption of innocence, which would protect the members of the train crew from the charge of theft of the contents of the package in the absence of satisfactory evidence that either of them was guilty, did not warrant the inference that some person committed the theft in the Fairbanks office.

The Circuit Court of Appeals for the Eighth Circuit had occasion, in the case of *United States Fidelity & Guaranty Co. v. Des Moines National Bank*, 145 Fed. 273, to express views in accord with

our contention here. In that case one Kelley, the regular receiving teller of the bank, was acting as paying teller during the temporary absence of the regular paying teller. A reserve chest in the bank's vault contained cash from which the paying teller replenished the counter money. This chest was as accessible to the other employees of the bank as it was to Kelley. It was a part of Kelley's duties to count the contents of this chest at the close of each day's business. He neglected to do so. When the regular paying teller returned, the chest was found to be $5000 short. The bank sued Kelley and his surety and obtained judgment. On writ of error the Circuit Court of Appeals reversed the judgment, holding that a verdict should have been directed in favor of the defendants. In criticising an instruction to the effect that the jury were warranted in finding that the loss occurred by reason of Kelley's negligence, notwithstanding that the evidence did not disclose the particular way the money was lost, the appellate court said:

> "Thus the charge proceeded, upon the view that, while the matter of when and how the loss occurred and what became of the money was not shown but left to conjecture, Kelley's relation to the money, his control over it, and his custody of it, were such that the jury would be justified in inferring that the loss, because not shown to be otherwise, was in some way or other the result of culpable negligence on his part. Essentially the same idea is expressed by counsel for the bank, when they say:
>
> 'We contend that by the manner of procedure in this bank, and the system of accounting in vogue in this bank, we have shown con-

clusively that Kelley got the money and can't tell what became of it, and so his bond is liable unless they show what became of it.'

"We cannot concur in that view. It presupposes that the reserve cash was within the control and custody of Kelley, and applies to him the rule applicable to a bailee or other custodian whose situation is such that a loss, if not otherwise explained, warrants the inference that it was due to his negligence or dishonesty. Kelley occupied no such relation to this money. He could take from it to replenish the counter cash and add to it from the latter, and it was his duty to count it at the close of business each day, and then to lock the safe; but, in other respects, it was not within his control or custody. It was the cashier, and not Kelley, who carried the combination to the lock, who could say whether the reserve chest should be kept locked or unlocked during business hours, and who could otherwise take measures for the safety of the money. When Kelley was attending to his important duties in the paying teller's cage, as was required most of the time, the reserve chest and its contents were beyond the range of his observation, the chest was unlocked, and its contents were easily accessible to other employees, over whom he had no control, and who were passing in and out of the vault, and sometimes out of the bank, without any immediate supervision of their movements. True they had no right to disturb the money, but that was not an assurance that none of them would yield to the temptation which the situation presented; nor does the presumption of innocence, which would protect them from the charge of theft in the absence of satisfactory evidence thereof, warrant the inference that Kelley was either negligent or dishonest. Smith v. First National Bank, 99 Mass. 605, 97 Am. Dec. 59. Such an inference cannot be

legitimately drawn from a rebuttable presumption, but only from premises which are certain.

Passing, for the moment, the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one of the other employees, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor."

The court then quotes with approval from *Asbach v. Chicago etc. Ry. Co.*, 74 Iowa 248, 37 N. W. 182, as follows:

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory."

Referring to the decision in *Smith v. First National Bank*, 99 Mass. 605, 97 Am. Dec. 59, the court says:

"The case of Smith v. First National Bank is well in point. It was an action to recover

the value of bonds deposited with the bank for safe-keeping and alleged to have been lost through its negligence. There was no evidence of negligence, except that which resulted by inference from the fact of loss, and the surrounding circumstances were such as to leave it equally open to inference that the bonds had been stolen by one of several persons who had access to the vault in which the bonds were kept. For a loss in the latter mode the bank was not responsible. The court, after observing that the plaintiff had the burden of proof, and that its evidence failed to exclude the possibility of loss by other means than negligence of the defendant, and left the case to be decided by mere inference, without any facts to determine which inference was correct, said:

'There being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of these propositions against the other is essentially wrong'."

In the case of *Neal v. Railway Co.*, 129 Iowa 5, 105 N. W. 197, it is said:

"If other conclusions may as reasonably be drawn as to the cause of the injury from the facts in evidence than that contended for, the evidence does not support the conclusions sought to be drawn from it. Verdicts must have evidence to support them, and the jury will not be permitted merely to conjecture how the accident occurred. * * *. If it appears that the facts and circumstances from which

> a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for."

The rule above stated, as distinguished from the view that it is sufficient for the party having the burden of proof to make out the more probable hypothesis, is accepted by a majority of the authorities. In addition to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *United States Fidelity & Guaranty Co. v. Des Moines National Bank*, supra, and the other cases above mentioned, the rule that a conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature and so related to each other that no other conclusion can fairly or reasonably be drawn from them, is supported by the following, among many other, cases:

Georgia R. etc. Co. v. Harris, 57 S. E. 1076 (Ga.);

Ohio Bldg. Safety Vault Co. v. Illinois Industrial Bd., 115 N. E. 149 (Ill.);

Cleveland etc. R. Co. v. Starks, 106 N. E. 646, 653 (Ind.);

Reynolds v. Maryland Casualty Co., 201 S. W. 1128 (Mo.);

Britt v. Omaha Concrete Stone Co., 156 N. W. 497 (Neb.);

Moscato v. Prince Line, 150 N. Y. S. 225;

Marquet v. Aetna Life Ins. Co., 159 S. W. 733 (Tenn.);

McDonald v. Provident etc. Soc., 84 N. W. 154 (Wisc.).

We contend that in a case like the present, where the place of loss was unknown, and where all of the known facts were inconsistent with the theory of loss in the Fairbanks office, there being no evidence of forcible entry, no evidence of tampering with the safe, no evidence of any kind of a burglary, but on the contrary there being evidence that the package left the office in the same condition as when it was received, the rule adopted by the foregoing authorities should be applied here. The inference that the theft took place on board the train, either before the train left Fairbanks, or after the train left Fairbanks, is just as fair and reasonable as the inference that it took place in the office. That being so, we submit that no verdict or judgment in the plaintiff's favor was warranted.

It should be apparent that the circumstance of the existence in the Fairbanks office of a stack of old magazines and a box of miscellaneous nails, some of which were similar to the nail found in the rifled package, fell short of constituting legitimate proof of theft in that office, since there was no proof that either the magazine or the nail was ever in that office. We submit that before the circumstance of the existence in the office of a stack of old magazines and of a box of nails could be considered as proof of theft in the office, it was incumbent upon plaintiff to prove that the particular magazine and the particular nail found in the package when it was opened were actually in the office on the night of September 15th when it is claimed the theft occurred. In permitting plaintiff to introduce evi-

dence of the existence in the office of a stack of old magazines and a box of miscellaneous nails, the court permitted the plaintiff to attempt to prove that the theft occurred in the office by conjectural circumstances. (Assignments of error 51 and 57.) The rule is well settled that where circumstantial evidence is relied upon, the circumstances must be proved and not presumed.

> "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved."
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> *Manning v. Insurance Co.*, 100 U. S. 698.

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. * * *. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption.* There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." (Italics added.)
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> *United States v. Ross*, 92 U. S. 281.

There being no evidence even remotely tending to prove that the theft was proximately caused by

any negligent act of the postmaster, and the circumstances shown relative to the place of loss being as consistent with the theory that the loss occurred outside of the office as with the theory that it occurred within the office, we submit that the jury should have been directed to return a verdict for the defendants. (Assignments of error 3 and 4.)

V.

COSTS IMPROPERLY TAXED AGAINST PETITIONERS.

After judgment was rendered, plaintiff filed a memorandum of costs and disbursements in the sum of $3,098.45. (R. 428-431.) Exceptions thereto were filed by defendants (R. 432-436), none of which were allowed by the clerk. Defendants appealed to the court from the order of the clerk taxing said costs as rendered, specifying the items which they claimed were not legally chargeable as costs in the case. These items are set forth on pages 438-441 of the Record. The trial court sustained defendants' objections to items aggregating $61.60, but disallowed all other objections, and taxed plaintiff's costs in the sum of $3,036.85. (R. 445-446.) Exceptions were duly taken to the various items allowed over defendants' objections. These exceptions are set out on pages 446-449 of the Record, and are covered by assignments of error numbers 74-76.

The witness A. H. Keller was allowed witness fees for 32 days at $4.00 per day and mileage for 940 miles at 15¢ per mile, and for 3680 miles at 5c per

mile, a total of $453.00. Defendants contend that fees should have been allowed for only such days as the witness was actually in attendance at the trial (the entire trial consumed only 3 days) and two days to travel 200 miles, and mileage for only 200 miles.

Defendants make the same contention as to the witness L. A. Fairborn, who was allowed fees for 8 days and mileage for 244 miles; as to the witness Frank Doner, who was allowed fees for 36 days and mileage for 4880 miles; as to the witness George Bentley, who was allowed fees for 34 days and mileage for 4880 miles; as to the witness Mrs. E. A. Williams, who was allowed fees for 10 days and mileage for 712 miles; as to the witness P. O. Wrangstedt, who was allowed fees for 28 days and mileage for 4994 miles, and as to the witness W. B. Raeburn, who was allowed fees for 34 days and mileage for 7338 miles.

Defendants also contend that the allowance of fees and mileage in any amount whatever to the witness James Hagan was not warranted, since he was a Deputy United States Marshal who was paid nothing for his attendance and who travelled on a pass on the government railway. That this witness travelled on a pass, and that plaintiff paid him nothing as witness fees, is shown by the stipulation set out on pages 443-445 of the Record. We submit that under these circumstances defendants could not be legally assessed for any costs on account of this witness. The amount allowed on his account was $37.70, $17.70 for mileage and $20.00 for witness fees.

As to the other items complained of and mentioned above, the question presented is whether plaintiff was entitled to recover mileage for its witnesses greater than the distance that could be reached by subpoena, namely, 100 miles, and fees in excess of the number of days actually in attendance, plus the number of days consumed in travelling the distance for which mileage is allowable.

By the stipulation just referred to it is shown that the plaintiff, before subpoenaing the witnesses named, all of whom were subpoenaed more than 100 miles from Fairbanks, did not make application to the court showing that the testimony of said witnesses was material, or that their testimony was important or desirable. It is further shown, by said stipulation, that the court did not endorse on the subpoenas an order for the attendance of the witnesses.

Section 1462 of the Compiled Laws of Alaska reads:

> "A witness is not obliged to attend for oral examination or otherwise at a place distant more than one hundred miles from the place where he resides or at which he may be served with a subpoena; except that, in an action or proceeding pending in a court of record, the court or judge thereof, upon the affidavit of the party or someone on his behalf, showing that the testimony of the witness is material and his oral examination is important and desirable, may indorse upon the subpoena an order for the attendance of the witness; and service of such subpoena and order and payment of legal fees to the witness are sufficient to require his attendance, if he be served within the district."

Plaintiff did not comply with these provisions, and as the witnesses mentioned were served without the district and at a distance of more than 100 miles from the place of trial, their testimony must be deemed to have been voluntary.

In the case of *United States v. Southern Pacific Co.*, 230 F. 270, Judge Trippet says:

> "In 1871 Judge Sawyer in the Circuit Court for the District of California (Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221), held that a subpoena served without the district and at a place more than 100 miles distant from the place of holding court had no potency, and that a witness who attended from beyond the district, and more than 100 miles distant from the place of holding the court, attended voluntarily. This decision is well supported by authority existing at that time and by many decisions rendered since, and it will be followed in this case."

Judge Bean, of the United States District Court of Oregon, in the case of *United States v. Southern Pacific Co.*, 172 F. 909, says:

> "The extent to which the prevailing party in a civil action may charge against his adversary mileage fees of witnesses who attended the trial on his behalf is a subject of much conflict in the federal decisions. The question has not been authoritatively decided by the Supreme Court or the Court of Appeals, so far as I am advised. In some jurisdictions it is held that the successful party is entitled to the mileage of his witnesses, regardless of the place of their residence, or whether they came from or out of the district, and whether they attended in obedience to a subpoena or at the request of the party. United States v. Sanborn (C. C.) 28 Fed. 299. In others it is held that since section

863, Rev. St. (U. S. Comp. St. 1901, p. 661), provides for taking the deposition of a witness residing more than 100 miles from the place of trial, the clerk has no authority to allow mileage for a witness residing at a greater distance, whether within or without the district. Smith v. Chicago & Northwestern R. Co. (C. C.), 38 Fed. 321. The rule, however, supported by the great weight of authority is that the prevailing party in a civil action is entitled to charge, as part of his costs, mileage for the distance necessarily traveled by a witness to attend the trial on his behalf from any place to which a subpœna will run; that is, from any point within the district or from any point out of the district and not exceeding 100 miles from the place of holding court."

In the recent case of *Kirby v. United States*, 273 F. 391, Judge Gilbert, speaking for the Circuit Court of Appeals for the Ninth Circuit, says:

"In United States v. Southern Pac. Co. (C. C.), 172 Fed. 909, Judge Bean followed the ruling in Hanchett v. Humphrey. In United States v. Southern Pac. Co. (D. C.), 230 Fed. 270, Judge Trippet held likewise. In neither of the last two cases was mention made of the decision of this court in Jesse D. Carr Land & Live Stock Co. v. United States, 118 Fed. 821, 55 C. C. A. 433, in which Judge De Haven, speaking for the court, said:

'The appellant's motion to strike from the bill of costs the amount claimed by the appellee for mileage and fees of certain witnesses, who came from without the state and more than 100 miles from the place of trial, was properly denied.' Citing United States v. Sanborn (C. C.), 28 Fed. 299.

Upon that decision the plaintiff in the present suit relies. We are of the opinion that the

> remarks of the court in that case should not be held decisive of the question here involved. The ruling was made, not on a motion to retax the costs, but on a motion to strike out the costs taxed as mileage and for expenses of witnesses. It does not appear that the question whether or not the witnesses were entitled to mileage for more than 100 miles was presented or discussed. Judge Hawley participated in the decision, notwithstanding his prior ruling in Hanchett v. Humphrey. We think it should not stand in the way of adopting the rule which is sustained by the weight of authority, as well as by the weight of reason, that mileage is taxable in the federal court only for the distance that could be reached by a subpoena, and we so hold."

In the case of *Morris-Turner Livestock Co. v. Director General of Railroads*, 266 F. 600, Judge Bourquin says:

> "The federal law of costs is fragmentary and indirect. Section 983, R. S. (Comp. St. Sec. 1624), which is merely declaratory of the law aside from it, provides certain costs shall be taxed against the losing party 'where by law costs are recoverable in favor of the prevailing party'.
>
> The law therein referred to is the law administered in federal courts; that is, federal law, and also state law, in so far as the latter is not inconsistent with the former."

If the trial court, in the trial of the case at bar, was sitting as a federal court, the rule as to costs adopted in the Ninth Circuit, as expressed in the *Kirby* case, supra, applies, namely, that mileage is taxable only for the distance that could be reached by a subpoena. On the other hand, if the trial court was sitting as a territorial court, the subpoena could

not reach to a distance of more than 100 miles unless procured in the manner provided by Section 1462 of the Compiled Laws of Alaska. The subpoenas here were not so procured. It follows, therefore, that there was no warrant for the allowance of the fees and mileage claimed on account of the mentioned witnesses.

We do not overlook the ruling of the Supreme Court of Oregon, on a statute similar to Section 1462 of the Compiled Laws of Alaska, that unless a losing party avers, when objecting to a claim for mileage on account of a witness attending voluntarily, that oral examination of the witness was unimportant or unnecessary, it is not error to allow such disbursements. (*Spencer v. Peterson*, 68 Pac. 1108.) A mere rule of procedure should not be so inflexible as to work injustice. It will be observed that all that is required, under this rule, is an averment as a conclusion that oral examination was unimportant or unnecessary. Such an averment does not assist the trial court in determining whether the objection is good, nor does it assist the appellate court in reviewing the trial court's order. All that is to be considered, by either court, is the testimony itself. If it appears from the testimony of a witness that the testimony could have been introduced by deposition just as well as by having the witness present at the trial, costs incurred in bringing him an excessive distance should not be allowed. Take as an illustration the testimony of the witness Keller. Plaintiff brought him from Seattle to testify that he was the freight

clerk who received the mail pouch from Lillico; that the pouch was closed and locked; that he handed it to Nordby in the freight car in that condition; that it was in his custody only a couple of minutes and that no other person touched it during that time. This testimony makes up only two pages of the Record, pages 90-92. We submit that it was unreasonable to bring a witness such a distance, and at an expense of $453, to give testimony of this character when his deposition could have been taken. An examination of the testimony of the other witnesses brought from an extreme distance will disclose a like situation.

It is to be noted, however, that the rule of practice just discussed applies only if it may be said that the trial court when trying the cause was sitting solely as a Territorial Court. We submit that it cannot be said that the trial court was so sitting. The cause before the court involved the responsibility of an employee of the United States. The case was not prosecuted under Alaska laws, but under federal statutes and regulations of the Post Office Department. In subpoenaing witnesses plaintiff disregarded the Alaska laws. In this situation, and in view of the fact that the trial court is of a dual nature, namely, a United States District Court and a Territorial Court, we submit that the rule relative to costs adopted in the Ninth Circuit, as expressed in *Kirby v. United States*, supra, should control.

The Circuit Court of Appeals held that Section 1462 of the Compiled Laws of Alaska was to be

construed as the Supreme Court of Oregon construed a similar statute, namely, that the adverse party is not entitled to complain of the failure to indorse on the subpoena an order requiring the attendance of the witness; that if the witness attends, he is entitled to his mileage and per diem, but that his per diem is limited to the days he is in attendance at the place of trial. To the extent that the plaintiff was allowed costs covering per diem of the witnesses in coming and going, the Circuit Court of Appeals reversed the judgment, but in other respects affirmed it. We submit that all of our exceptions with reference to the matter of costs are well taken.

Upon the grounds hereinabove set forth, we submit that the judgment and order of the trial court and of the Circuit Court of Appeals should be reversed.

Dated, San Francisco,
March 31, 1927.

Respectfully submitted,
LOUIS S. BEEDY,
Attorney for Petitioners.